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MEMORANDUM

TO: Theodore A. Cobb, Assistant Chief Counsel
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State Water Resources Control Board


FROM: Harold J. Singer
EXECUTIVE OFFICER

DATE: December 8, 2004

SUBJECT: REGION 6 RESPONSE TO PETITIONS, SWRCB/OCC FILES A-1669 & 1669(a) REGARDING FAILURE TO ISSUE NPDES PERMIT TO CALIFORNIA DEPARTMENT OF FISH AND GAME FOR ITS USE OF ROTENONE IN SILVER KING CREEK IN ALPINE COUNTY

Two petitions were submitted to the State Board regarding the Regional Board's decision not to issue an NPDES permit in the above-referenced matter, at the September 8, 2004 Regional Board meeting. The California Department of Fish and Game (DFG) and U.S. Fish and Wildlife Service (USFWS) submitted a joint petition, and Trout Unlimited filed a separate petition. This memorandum constitutes the Lahontan Regional Board's response to the allegations contained in both of those petitions.

We wish to correct an apparent error in the subject lines of some of your recent correspondence (including the November 9, 2004 notice regarding review of the petitions). The subject lines suggest that the Regional Board failed to act on a request to grant an NPDES permit to USFWS, as well as DFG. However, DFG was the sole applicant for the permit considered by the Regional Board. USFWS did not apply for an NPDES permit, and was never identified as a potential permittee.

Because the contentions made in the petition filed by Trout Unlimited (File A-1669) are encompassed by the petition filed by DFG and USFWS (File A-1669(a)), our responses in this memorandum refer to the contentions in the latter petition while addressing both petitions.

The contentions contained in the petitions were not in numbered order. We have summarized the major contentions, assigned a number to each, and we respond to each contention in order below.

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The Reference list at the end of this memorandum indicates the Item Number, from the Index to the Public Record, for each reference cited.

INTRODUCTION AND BACKGROUND

On May 20, 2004, the DFG submitted an application to the Regional Board for an NPDES permit for use of the aquatic pesticide rotenone. The project is part of recovery efforts for the Paiute Cutthroat Trout at Silver King Creek. The Paiute Cutthroat Trout is listed as a threatened species under the federal Endangered Species Act. The project is located in federally-designated Wilderness Areas in the Humboldt-Toiyabe National Forest, within the East Fork Carson River Hydrologic Unit. In the context of this project, DFG proposes to use rotenone to eradicate non-native fish that can outcompete and interbreed with Paiute Cutthroat Trout.

Paiute Cutthroat Trout were successfully reintroduced to upper portions of Silver King Creek, above a natural fish barrier (Llewellyn Falls), following rotenone treatments in 1991, 1992, and 1993. The Petitioners assert that they are concerned that non-native fish from below this barrier could easily be transplanted, illegally, into the area above Llewellyn Falls that harbors the restored Paiute Cutthroat Trout. This, they claim, could jeopardize recovery efforts and potentially the survival of the species. According to the Petitioners, the current project is intended to prevent such an event, and safeguard and enhance the restoration of Paiute Cutthroat Trout, by eradicating non-native fish from portions of Silver King Creek downstream of Llewellyn Falls, and associated tributary streams, as well as a tributary lake (Tamarack Lake). Paiute Cutthroat trout would subsequently be introduced into the treated area, which encompasses a total of approximately eleven stream miles.

The Regional Board considered issuing the permit after a public hearing on September 8, 2004, but did not adopt the permit at that time. As stated in the petition (p. 7, lines 23-25), DFG "subsequently cancelled the Project for this year because the Regional Board's failure to issue the permit closed the last safe window of opportunity for rotenone application in 2004." Colder temperatures after mid-September reportedly inhibit rotenone's effectiveness, and slow the dissipation of chemical residues following treatment.

In choosing not to adopt the permit, the Regional Board acted legally and appropriately, as shown by evidence contained in the public record (hereinafter "Record"). The petitions are without merit, for reasons explained in Regional Board staff's responses to allegations made in the petitions, as elaborated below.

RESPONSE TO JOINT PETITION BY DFG and USFWS (FILE A-1669(a))

1) Contention: The Regional Board's decision obstructs implementation of the Endangered Species Act (ESA) federal Recovery Plan for the Paiute Cutthroat Trout.

The petition alleges (p. 2, lines 5-7) that the Regional Board's action "has blocked the Petitioners' execution of the Project and has consequently obstructed the implementation of a final, approved Endangered Species Act . . . recovery plan for the PCT [Paiute Cutthroat

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Trout].” Similarly, the petition charges (p. 11, lines 11-12) that the Regional Board “has improperly obstructed the implementation of the USFWS’ mandate to implement the Recovery Plan pursuant to the ESA . . .”

Response: The USFWS prepared a draft Revised Recovery Plan for the Paiute Cutthroat Trout (*Recovery Plan*, see Reference 1) that is included in the Record.¹ The Regional Board’s action does not block implementation of the Endangered Species Act *Recovery Plan* for the Paiute Cutthroat Trout, and does not prevent the USFWS from pursuing its mandate. The *Recovery Plan* contains an Implementation Schedule that identifies the Silver King Creek project as a highest-priority action (p. 65). The Implementation Schedule also identifies parties responsible for implementation (DFG, USFWS, and U.S. Forest Service–Humboldt-Toiyabe National Forest), and sets forth a tentative time schedule for implementation. However, p. 63 explains that the Implementation Schedule is “a guide for meeting the recovery goals contained in this plan [emphasis added].” Thus, the Implementation Schedule is a considered a guide, not a mandate to implement the actions according to a rigid schedule. The Regional Board’s decision may delay the Petitioners from meeting the tentative timetable described in the Implementation Schedule. But since there is no federal requirement to meet the time schedule, there is no merit to the Petitioners’ contention that the Regional Board acted inappropriately, or that the Regional Board’s action prevents them from complying with *Recovery Plan* requirements or an Endangered Species Act mandate.

The *Recovery Plan* Implementation Schedule also contains the following disclaimer: “The listing of a party in the Implementation Schedule does not require, nor imply a requirement, that the identified party has agreed to implement the actions or to secure funding for implementing the actions [emphasis added].” The *Recovery Plan* explicitly does not obligate the responsible agencies to implement, or fund, the listed recovery actions. If the Petitioners, as the responsible implementing agencies, are not themselves obligated by the *Recovery Plan*, then there is no merit to the Petitioners’ claim that the Regional Board obstructed them from complying with a federal mandate.

2) **Contention: The Regional Board’s decision threatens Paiute Cutthroat Trout restoration efforts, and puts the species’ survival at risk.**

The petition alleges (p. 2, lines 5-7) that the Regional Board’s action “threatens the future survival” of the Paiute Cutthroat Trout species. Similarly, the petition contends (p. 11, lines 11-12) that the Regional Board has “threatened the recovery of the PCT.” The petition further implies (p. 3, lines 1-8) that the Regional Board’s decision could lead to extinction of this threatened fish species.

¹ According to a USFWS representative present at the public hearing, the final Revised Recovery Plan for the Paiute Cutthroat Trout was received from the printer on September 6, 2004, two days prior to the public hearing. Since the final Recovery Plan was not made available for Regional Board consideration prior to the September 8, 2004 hearing, the Regional Board specifically excluded it from the Record on the advice of counsel (refer to public hearing audiotape, side 1).

Response: The Petitioners did not demonstrate that delaying issuance of the permit would constitute a threat to Paiute Cutthroat Trout recovery efforts in the long term, or could threaten the survival of the species.

The Regional Board's decision does not constitute a permanent block on the project. The Regional Board could reconsider issuing a permit if the Petitioners provide certain information requested by some Regional Board members to make an informed decision. In effect, this may delay project implementation. The Petitioners did not demonstrate that such a delay is unreasonable or unjustified, or that a delay would significantly impede long-term Paiute Cutthroat Trout recovery efforts, or threaten the species' survival.

The Petitioners failed to demonstrate an urgent need for the permit in their testimony. In reaching its decision, the Regional Board received evidence and testimony showing that several isolated, genetically pure populations of Paiute Cutthroat Trout are already established in a number of locations in California. These include several populations within the Silver King Creek basin (Reference 2): a population successfully maintained in Corral Valley Creek since rotenone treatment in 1977; a population maintained in Coyote Valley Creek since 1987 and 1988 rotenone treatments; and the population maintained in Silver King Creek upstream of Llewellyn Falls that has been maintained since the 1991-1993 treatments. Together, these existing populations occupy approximately 11.5 miles of stream habitat (Reference 1, p. iii).

In addition, four "self-sustaining" pure populations of Paiute Cutthroat Trout have been established outside of the Silver King basin, in Cottonwood Creek, Cabin Creek, Stairway Creek, and Sharktooth Creek (Reference 1, p. 15).

There exists an inherent risk that any of these populations could be placed at risk from a damaging event such as illegal transplantation of non-native fish or a forest fire. However, the existence of multiple isolated refugia populations substantially lessens the risk that a catastrophic event in one location will imperil long-term recovery efforts, or threaten the survival of the species. The populations listed above have been successfully maintained for many years, despite the inherent risks. The Record therefore does not support the degree of urgency claimed by the Petitioners. In fact, testimony and documentation demonstrated that the population upstream of Llewellyn Falls had been successfully maintained, without contamination, since 1993 (refer to Reference 1, pp. 14 and 19). The Petitioners did not demonstrate that the Regional Board's failure to immediately issue a permit poses an unreasonable risk to the species, or that a delay in project implementation is not justified in order to address concerns raised in testimony and evidence presented to the Regional Board.

The USFWS representative, Chad Mellison, was specifically asked by one Regional Board member (Amy Horne) to gauge the level of risk to Paiute Cutthroat Trout recovery efforts if the project were delayed by several years. The following exchange (refer to public hearing transcript, Reference #3, pp. 33-34) between Ms. Horne and Chad Mellison (USFWS) shows that the Petitioners were unable to demonstrate an urgent need for the permit:

Horne: The part of the project that troubles me is that, the possibility that macroinvertebrate species, the studies haven't been done to know whether rare or endangered macroinvertebrate species could be wiped out, endemic species could be wiped out by the rotenone. And so I'm wondering how the recovery, what impact would there be on their recovery if the project were delayed by three years in order to give scientists a chance to go in and do a thorough study on the macroinvertebrates, a scientifically valid study to insure that there weren't any endemic species that would be lost.

Mellison: Well, it would put the species [Paiute Cutthroat Trout] at risk for three more years of non-natives.

Horne: It seems like it's done okay for 11 years now, right?

Mellison: Yes, it has. But we have spent a considerable amount of time, a considerable amount of money, to get this project going . . .

Horne: I understand that, and I understand a lot of work has gone into this and people are very excited about this project. But I remain concerned that we could be trading some species off for other species. And, you know, that's a real ethical quandary I think. I mean, from an aquatic biologist's standpoint people are very excited about the fish, but other people are excited about the macroinvertebrates.

Mellison: Sure, I might add that not all the treatment, there are many untreated areas.

Horne: Yeah, but . . .

Mellison: Not all springs and seeps are going to be treated, not all headwaters are going to be treated, and you know, again, a considerable amount of money . . .

Horne: Again, so how would it affect the *Recovery Plan* to delay by three years to conduct a scientifically valid survey of the macroinvertebrates?

Mellison: I don't think it would really do anything to the *Recovery Plan*. We have to list by year the actions that are done. So all that would be thrown out on the list [?], I guess, semantics, we can always just say "new information became available."

Horne: Okay, thank you.

This exchange shows how the Petitioners' own testimony at the Public Hearing failed to demonstrate that delaying issuance of the permit would imperil long-term recovery efforts.

Evidence and testimony entered into the Record shows that a delay was reasonable and justified in order to address expressed concerns including: insufficient information regarding the possible presence of, and effects on, rare or endemic benthic macroinvertebrate species

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(i.e., species that are unique to the project area or immediate vicinity); insufficient information regarding the extent and duration of long-term impacts to macroinvertebrate communities in general (e.g., community structure and diversity); and potential economic impacts to Alpine County due to loss of fisheries. Evidence and testimony received regarding these and other major concerns shows that delaying the project is reasonable and justified, as summarized in our response to Contention #3, below.

3) **Contention: The Regional Board improperly withheld permit approval by requiring that surveys for rare or endemic macroinvertebrates be completed prior to approval.**

The petition claims (p. 8, lines 6-17), "The Regional Board refused to take action to approve the NPDES permit until the completion of studies in the Project area to prove the existence or non-existence of rare or endemic macroinvertebrates. The Regional Board is thus essentially attacking the sufficiency of the Department's initial study and MND [Mitigated Negative Declaration]. The Department, as CEQA [California Environmental Quality Act] lead agency, had already considered rare or endemic macroinvertebrate issues in its CEQA review. The Department had already considered and responded to related comments from the Regional Board and Ms. Erman. And the Department already found in its MND that the Project would not have a significant effect on these species because there was no data demonstrating their existence in the project area."

Response: The Regional Board's action was based upon the Record and evidence received at the public hearing on the NPDES permit, not upon any objection to the adequacy of CEQA documents. The Regional Board received evidence at the public hearing regarding a number of issues of concern, including expert testimony suggesting that rare or endemic species are likely to exist in project area. Each of these issues supports the Regional Board's determination. Contrary to the Contention, the Regional Board did not make a formal statement identifying the basis for withholding permit approval, and made no formal statement conditioning permit approval upon completion of surveys for rare or endemic species. However, the Regional Board has the authority or purview to require additional information to evaluate compliance with Basin Plan requirements. Evidence received by the Regional Board addressing major issues of concern included:

A. ***Evidence that the project will have long-term effects on macroinvertebrate communities, probably including rare and endemic species, and assertions by project opponents that the project will therefore violate Basin Plan provisions requiring beneficial use restoration within two years of rotenone treatment.***

The *Water Quality Control Plan for the Lahontan Region* (Basin Plan) policy for rotenone use (pp. 4.9-23 through 4.9-26) by DFG requires that within two years following rotenone treatment, DFG must assess the restoration of applicable beneficial uses to treated waters, and certify in writing that beneficial uses have been restored.² In other

² The Regional Board was asked by staff to consider alternative interpretations of the Basin Plan rotenone policy, as shown by the following excerpt from the public hearing transcript (refer to Reference 3, page 8):

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words, the Basin Plan requires restoration of beneficial uses in two years. The Regional Board received evidence and heard testimony at the public hearing, that beneficial uses would not be so restored.

Several expert stream ecologists submitted evidence suggesting DFG's own monitoring data show that aquatic macroinvertebrate communities in upper portions of the Silver King Creek drainage did not recover from rotenone treatments conducted in 1991-1993. This evidence and testimony included: comments submitted by Dr. Herbst (References 4 and 5) describing deficiencies of existing DFG macroinvertebrate studies and evidence of long-term impacts from rotenone treatments; comments submitted by Dr. Curry (Reference 6); and comments submitted by Dr. Nancy Erman and Dr. Don Erman. Nancy Erman also made a detailed presentation at the public hearing (refer to public hearing transcript, Reference 3, pp. 50-58) and provided handouts (Reference 7), to support her view that DFG's monitoring data demonstrate long-term impacts to macroinvertebrates.

Regional Board staff similarly questioned DFG claims that monitoring of past projects and monitoring data disclose no evidence of long-term impacts, and expressed concerns regarding study-design deficiencies and DFG's interpretation of those studies. These concerns were also expressed in staff's presentation (Reference 3, pp. 10-11), and in staff comments on DFG's Negative Declaration (Reference 8, Comments #1 through #6).

Dr. Erman, and other commenters including Ann McCampbell and Patricia Clary (Reference 9), and Laurel Ames (Reference 10), voiced the opinion that the project will result in long-term impacts to macroinvertebrates, and asserted that this would violate the Basin Plan requirement to restore beneficial uses within two years of treatment.

According to these commenters, DFG has not answered legitimate objections that its studies were not adequate to characterize the extent and duration of impacts to macroinvertebrates, or objections that its analysis of macroinvertebrate monitoring data was flawed. They contend that DFG has not answered legitimate objections, and has

"... And I would ask the Board to use its discretion to consider the following question, when is the cold freshwater habitat beneficial use considered to be restored? Does it occur when chemical residues have dissipated and the waters are capable of supporting invertebrate habitat? Can we consider that to have been achieved when indicators say that there's an abundant and thriving quote/unquote "healthy" population of invertebrates has repopulated the treated area? Or is it necessary for the original pre-project invertebrate community structure to be reproduced? ..."

Though the question was not resolved, Board member Horne noted that one of the beneficial uses of waters of Silver King Creek is for rare, threatened or endangered species, and opined: "... if the water is good enough to support a [macroinvertebrate] species that no longer exists, then I'm not sure that that really is in the spirit of the Basin Plan, if a species got wiped out in the process ..." (refer to public hearing transcript, Reference 3, page 70).

ignored data from its own monitoring studies suggesting that some impacts may have lasted beyond the three-year study period.³

Dr. Erman further alleged that DFG has withheld macroinvertebrate monitoring data that she has reportedly requested (i.e., under the California Public Records Act), thereby frustrating her efforts to conduct outside review.

B. *Comments and testimony, including statements from expert stream ecologists, suggesting that rare or endemic are likely to be present in the treatment area (particularly in headwater areas), and that if present, such species could potentially be devastated by rotenone treatment.*

One expert (Dr. Nancy Erman, Specialist Emeritus, Aquatic Ecology/Freshwater Invertebrates, U.C. Davis) suggested, in an August 5, 2004 comment letter (Reference 11, pp. 2-3) that an exhaustive species inventory, designed to identify rare or endemic species, could feasibly be done for \$50,000 to \$75,000 over a three-year period. Conducting such a study may be reasonable if it can definitively answer questions regarding rare or endemic species.

In a June 30, 2004 comment letter (Reference 12), Dr. Erman cited scientific literature that suggests “in a drainage this size in a Wilderness Area (that should be relatively undisturbed), we might expect several endemic species . . .”

Dr. Robert R. Curry (Professor Emeritus, U.C. Santa Cruz) commented in an August 3, 2004 letter (Reference 6) that “This [Silver King Creek] basin . . . almost certainly harbors unique species of insects and other invertebrates. Studies elsewhere in the Sierra Nevada have shown that isolated streams, headwaters, and springs are sources for endemic and rare species . . .”

In a March 12, 2004 letter to the U.S. Forest Service (included as an attachment to an August 16, 2004 comment letter to the Regional Board, Reference 4) regarding the Environmental Assessment, Dr. David B. Herbst (Sierra Nevada Aquatic Research Laboratory, University of California) states: “I am also especially concerned about treatment of headwater stream habitats that have not been the subject of any studies to address potential severe impacts on waters that have no upstream re-colonization sources. These are typically areas with diverse communities of organisms with narrow distributions and highly specific habitat requirements.” Within the proposed treatment area, the main stem of Silver King Creek below Llewellyn Falls is fed by the upstream waters of Silver King Creek. However, there are numerous tributaries within the proposed treatment area that are true headwaters without any upstream water sources.

³ Since macroinvertebrate monitoring by DFG continued for only three years following the 1991-1993 project, it has not been established how long such impacts may have persisted or whether affected macroinvertebrate communities have fully recovered.

These experts expressed particular concern that rotenone treatment in headwater areas could have significant long-term impacts on macroinvertebrate communities, including rare or endemic macroinvertebrates.

DFG did not produce evidence to counter the assertions of these experts that rare or endemic invertebrates are likely. Although DFG conducted macroinvertebrate monitoring in the Silver King Creek watershed as part of earlier treatments, those studies surveyed only larval forms. It is not possible to make species determinations from the larval forms of most aquatic macroinvertebrates. Therefore, the previous studies were designed to assess the condition and health of macroinvertebrate populations in general, but they were not designed to ascertain whether rare or endemic species are present in the project area. Regional Board staff raised this issue as a concern in comments on DFG's draft Negative Declaration (Reference 8, p. 3, Comment 6), noted the limitations of the existing surveys, and suggested that DFG consider conducting a properly-designed species inventory. However, DFG did not acknowledge the limitations of the existing studies in its response (Reference 13, p. pp. 5-6, Response 6), and ignored the suggestion to conduct additional monitoring.

In the petition (page 5, lines 5-6), the Petitioners state, "... agencies are not required under NEPA [the National Environmental Policy Act] to analyze remote and speculative impacts of an action, such as the unproven existence of potential rare or endemic taxa . . ." The comment letters received by the Regional Board from expert stream ecologists suggest that rare or endemic taxa may be likely in the project area, and that there is support for this claim in the scientific literature. This scientific opinion moves the issue past the level of "remote and speculative" into the realm of "possible" or even "probable." DFG has consistently ignored this legitimate issue, and has not conducted a species inventory to ascertain whether rare or endemic species are present in the treatment areas, or explored the feasibility of conducting such a study. Conducting such a survey could delay project implementation by several years, or have other implications for the project if rare or endemic species are found. However, DFG has not established that such a survey is infeasible, or that such a delay would be unjustified in order to establish that rare or endemic macroinvertebrates are not at risk.

C. Evidence that the proposed rotenone treatment may violate Basin Plan limits on concentration and persistence of chemical residues associated with rotenone treatments.

The Basin Plan rotenone policy establishes receiving water limits on chemical residues, including a provision prohibiting the persistence of any chemical residues beyond two weeks following treatment. The Regional Board considered evidence and testimony describing incidents associated with past DFG rotenone projects in the Lahontan Region, where Basin Plan receiving water limits were violated. This evidence was described in presentations by Regional Board staff (refer to public hearing transcript, Reference 3, page 10) and Laurel Ames (public hearing transcript, Reference 3, pp.66), as well as comment letters received from Laurel Ames (Reference 10) and Nancy Erman



(References 12 and 14). Considering the past history of violations, project critics questioned whether the current project will comply with Basin Plan receiving water limits, and urged the Regional Board not to adopt the permit.

D. Concerns expressed by representatives of Alpine County regarding potential economic impacts due to loss of recreational fisheries.

Don Jardine (Alpine County Board of Supervisors), and Dennis Crabb (attorney representing Alpine County) made presentations expressing concern about economic impacts from lost recreational fishing opportunities if the poisoning project were carried out. Alpine County is a small, sparsely-populated rural county that relies heavily on recreation and tourism for revenue. In addition to the lost fishery in the Silver King Creek drainage, they are concerned that many anglers will avoid Alpine County if they perceive that "Alpine County waters are poisoned" (refer to presentation of Dennis Crabb on public hearing transcript, pp. 35-36) and that this could have "devastating economic impacts." They also questioned whether the project proponents made sufficient efforts to solicit input from stakeholders, including the County itself, on potential economic consequences. The County representatives argued that the County had been virtually ignored in the planning process (refer to public hearing audiotape, presentations by Mr. Crabb and Mr. Jardine, pp. 35-42).

E. Objections expressed by project opponents that there would be insufficient time to petition a Regional Board decision to adopt the permit, prior to the scheduled discharge of rotenone and rotenone-related chemicals.

DFG representatives testified at the September 8 (Wednesday) public hearing that if the permit were adopted at that meeting, they planned to commence treatment on September 13 (Monday). Project opponents voiced concerns that they would have insufficient time if the permit were adopted at the September 8 meeting, to prepare and submit a petition to the State Water Resources Control challenging the decision, or exhaust other legal remedies, prior to the planned discharge of chemicals on September 13.

Adopting the permit with a delayed treatment date would have allowed better opportunity for opponents to exhaust their legal remedies, and was a possible option for the Regional Board. However, colder temperatures after mid-September reportedly inhibit rotenone's effectiveness, and slow the dissipation of chemical residues following treatment. However, as explained in the petition (p. 7, lines 23-25), DFG considers mid-September to be the "last safe window of opportunity for rotenone application in 2004." So adopting a permit with a delayed treatment date would have probably made treatment impractical this year.

- 4) **Contention: Because the Regional Board did not legally challenge the adequacy of DFG's CEQA document, the Regional Board in effect waived its discretion to withhold permitting approval.**

The petition alleges (p. 8):

"The Regional Board refused to take action to approve the NPDES permit until the completion of studies in the Project area to prove the existence or non-existence of rare or endemic macroinvertebrates. The Regional Board is thus essentially attacking the sufficiency of the Departments' initial study and MND [Mitigated Negative Declaration] . . . the Regional Board has already legally waived its objections to the Department's MND. Thus, the Regional Board was bound by the Department's findings in considering the environmental effects of the Project." [emphasis added]

The petition also claims (p. 10):

"The Regional Board was obligated to consider the Project's effect on the environment as determined by the four corners of the Department's MND pursuant to 15096(f) of the CEQA Guidelines. Instead, the Regional Board attacked the sufficiency of the Department's CEQA review and exceeded its legal authority in justifying its decision to withhold approval of the NPDES permit. Consequently, the Regional Board's failure to act was improper."

Response: This contention is invalid for the three reasons listed in sections A, B, and C below:

- A. ***The Regional Boars acted upon evidence and testimony presented at the public hearing, not upon the perceived adequacy or inadequacy of the DFG's CEQA document.*** The adequacy of the CEQA document was not raised as an issue by the Regional Board at the public hearing.

The Petitioners are failing to distinguish between two completely separate processes, the CEQA environmental review process conducted by DFG, and the Regional Board process for considering adoption of an NPDES permit. The question for this petition is whether the Regional Board's determination is supported by substantial evidence. As demonstrated throughout this Response, it clearly is.

- B. ***Regional Boards are generally exempt from CEQA provisions when considering adoption of NPDES permits.*** Pursuant to California Water Code (CWC) Section 13389, the Regional Board is not constrained by CEQA Chapter 3 provisions in adopting an NPDES permit⁴ as noted in Finding #19 of the proposed permit. Therefore, it is not

⁴ The proposed permit contained an exception from meeting California Toxics Rule (CTR) criteria for toxic priority pollutants. Although Regional Board adoption of an NPDES permit is generally not subject to CEQA, granting a CTR exception is, so Finding #19 of the permit did contain CEQA compliance findings necessary specifically for granting the proposed CTR exception.

dispositive of the permit issue whether the Regional Board followed CEQA procedures for challenging the Negative Declaration. Because the Regional Board was not bound by CEQA in withholding permit approval, the Regional Board acted properly, and did not exceed its legal authority.

Furthermore, although Regional Board staff did not formally appeal DFG's Negative Declaration, in comments (Reference 8) submitted to DFG on the draft Negative Declaration we strongly questioned whether potential impacts to macroinvertebrates were adequately analyzed in that document. Our specific concerns were detailed in Comments #1 through #6. In Comment #1, staff questioned whether the Negative Declaration adequately evaluated and disclosed the known and potential impacts to non-target organisms, including benthic macroinvertebrates. Comment #1 specifically recommended that "A comprehensive evaluation should be made, and if it is determined that there is potential for significant long-term impacts to non-target organisms that cannot be mitigated, the CDFG should prepare an EIR [Environmental Impact Report] for this project." In Comment #3, we summarized deficiencies of DFG's previous studies of rotenone impacts on macroinvertebrate communities, and concluded:

"The draft Negative Declaration does not adequately describe the study findings, or recognize the limitations in study scope and methodology. In our opinion, the cited studies do not convincingly demonstrate that the proposed project will have no significant adverse impacts on non-target benthic communities."

In Comment #6, we stated "[t]he draft Negative Declaration does not discuss the possibility that populations of rare or endemic species of macroinvertebrates could be present that might be impacted by rotenone treatment. Although macroinvertebrate monitoring in parts of the Silver King Creek watershed was conducted as part of the earlier treatments, the degree to which the type of monitoring performed is capable of detecting rare or endemic species is not clear. The draft Negative Declaration should address this issue. If the CDFG cannot give reasonable assurance that rare or endemic species are not present or would not be significantly impacted by rotenone use, additional surveys may be an appropriate mitigation measure to require prior to treatment."

DFG responded to these comments in a memo dated April 1, 2003 (Reference 13), but brushed aside staff's concerns regarding potential impacts to macroinvertebrates, and did not revise the Negative Declaration as recommended by staff to address these concerns. DFG did not modify its evaluation of potential impacts to macroinvertebrates, and chose not to prepare an EIR.

DFG has not answered legitimate objections that macroinvertebrate studies conducted during past rotenone treatments at Silver King Creek were not adequately designed to determine the nature and duration of impacts to macroinvertebrates, and that DFG ignored certain measures and metrics suggesting that some impacts may have lasted beyond the three-year study period.

- C. *If the Petitioners' argument is upheld, this would mean that failure to formally challenge a CEQA document would foreclose a responsible agency from applying its substantive requirements in a permit granted for the project. This is not the intent or affect of CEQA.*

Under CEQA, failure to challenge the adequacy of the lead agency's CEQA document does not obligate responsible agencies to approve the project. The process for accepting or challenging the CEQA document is distinct from the process for approving or disapproving of the project. Section 15096(e) of the CEQA Guidelines lists four options available to a responsible agency when it believes that the lead agency's CEQA document is inadequate. If the responsible agency fails to either challenge the CEQA document in court, prepare its own CEQA document, or assume the lead agency role, then, pursuant to Section 15096(e)(2), the responsible agency must "be deemed to have waived any objection to the adequacy of the EIR or negative declaration."

However, waiving objections to a CEQA document does not constitute *de facto* approval of the project by the responsible agency. It does not deprive the responsible agency of its discretionary authority to withhold project approval. If the Petitioners' contention were sustained, it would establish a precedent that will deny any CEQA responsible agency its discretionary authority to disapprove projects in any case where staff has not formally challenged the lead agency's CEQA document.

- 5) **Contention: The Regional Board acted improperly by failing to follow federal procedures to challenge the sufficiency of federal environmental review documents.**

The petition alleges (p. 11, lines 1-13) that the Regional Board substituted "its own administrative process" for federal procedures, to challenge the sufficiency of the federal agencies' environmental review. It alleges that, because the Regional Board did not file a petition, according to federal procedures, for administrative review of federal environmental documents (USFWS' Biological Opinion, and the U.S. Forest Service's Environmental Assessment), by denying the permit the Regional Board improperly obstructed USFWS from implementing its federal mandate.

Response: The Record does not support the Petitioners' position that the adequacy of federal environmental documents was an issue, or a basis for the Regional Board's action. There is no evidence that the adequacy of the federal documents was ever questioned by the Regional Board. Therefore it cannot be said that the Regional Board substituted its own administrative procedures to challenge those documents. In any case, NEPA does not obligate state regulatory agencies to give permitting approval to projects by default whenever they fail to exercise their right of challenging federal environmental documents. This Contention is substantially the same as Contention #4, above.

6) **Contention: The Petitioners suffered significant loss of public funds due to the Regional Board's failure to act.**

The petition states on pp. 6-7 that DFG, USFWS, and U.S. Forest Service "proceeded with plans to commence the Project during the first part of September, 2004 in *reasonable reliance on the tentative and proposed permits and the Regional Board staff recommendation to adopt . . .*" The DFG then made arrangements and funding outlays for staffing and equipment to carry out the project according to schedule. Significant state funds were reportedly lost when the project was cancelled following the Regional Board's decision. Federal funding appropriated for the project was also reportedly lost.

Response: The Regional Board is not responsible for losses suffered by the Petitioners for project preparations and arrangements made prior to the Regional Board's decision. The project proponents were aware that the Regional Board's decision could not be predicted in advance, despite any staff recommendations, and was aware of the risks involved in proceeding with preparations and arrangements prior to the Regional Board's decision.

The Regional Board is not responsible for the timing constraints that were imposed by events beyond its control. As explained above under "Introduction and Background," mid-September was the last safe window of opportunity for DFG to carry out the project this year.

This constraint placed the DFG in a position where it had to choose whether or not to proceed with project plans while awaiting Regional Board action on the proposed permit at the September 8 public hearing. That choice might have been obviated if it had been possible to schedule the public hearing for an earlier Regional Board meeting. However, circumstances prevented the Regional Board from scheduling the permit hearing for an earlier meeting. The DFG's application for an NPDES permit was received May 20, 2004, the same day the State Board adopted Water Quality Order No. 2004-0008-DWQ (*Statewide General National Pollutant Discharge Elimination System Permit for Discharges of Aquatic Pesticides to Surface Waters of the United States for Vector Control*). The State Board had earlier rejected a request from DFG to authorize the use of rotenone through the above-cited permit. Federal rules require a 30-day public notification and public review period prior to consideration of an NPDES permit. The Regional Board scheduled the matter for the earliest opportunity (the September 8, 2004 meeting) consistent with the time necessary to prepare and circulate a draft permit.

7) **Contention: Late receipt of Regional Board staff's response to comment letter, regarding potential impacts to rare or endemic macroinvertebrates, allegedly prevented DFG from preparing a meaningful rebuttal.**

The petition notes (footnote 5, p.7) that DFG did not receive staff's written response (mailed September 2, 2004) to Dr. Erman's comment letters until two days after the Regional Board made its decision to take no action on the proposed permit. In the staff response to Dr. Erman, staff observed:

“We recognize that neither the invertebrate surveys conducted by DFG in the past, nor the currently proposed studies, are capable of ruling out the possibility of rare species in the project area. Although no unique or rare species were identified, those surveys considered only larval forms. An exhaustive species inventory would reportedly require collecting and analyzing adult life stages of aquatic invertebrates. We note your assertion that such an inventory might feasibly be done for \$50,000 to \$75,000 over a three-year period, and that this is perhaps reasonable if it could definitively answer questions regarding rare or endemic species.”

The Petitioner’s allege that their late receipt of staff’s response letter to Dr. Erman “prevented a meaningful response to this issue in the Department’s presentation at the meeting, since our agency was caught unaware that Regional Board staff was prepared to suggest that more studies were necessary.”

Response: Contrary to the Petitioners’ contention, at no point did Regional Board staff recommend or “suggest” to the Regional Board that it should require additional studies for rare or endemic species, or state that such studies were “necessary.” Staff did discuss, during the staff presentation, concerns raised by commenters regarding potential impacts to such species, and specifically advised the Regional Board of Dr. Erman’s comments asserting that such studies may be feasible and reasonable. But staff did not advocate Dr. Erman’s position regarding that issue.

We regret that DFG counsel received staff’s response to Dr. Erman late, however, staff did provide a copy of Dr. Erman’s comment letter to DFG counsel well in advance of the Regional Board meeting. More importantly, as noted in Response 4.B above, Regional Board staff had previously communicated to DFG (Reference 8, p. 3, Comment 6) staff’s opinion that additional studies for rare or endemic macroinvertebrates might be justified. Based on comment letters, DFG was aware of commenters’ concerns that impacts to rare or endemic macroinvertebrates had not been adequately considered. DFG is therefore solely responsible if it was unprepared to address matters concerning the need for, and feasibility of, conducting an exhaustive macroinvertebrate species inventory.

SUMMARY AND CONCLUSION

For reasons described in our responses above, the evidence in the Record does not support the Petitioners’ arguments. Based on the Record, the petitions should be denied.

Thank you for the opportunity to provide this response to the petitions. Please call me at (530) 542-5412 if you have any questions regarding this response to the Petitions.

cc: Regional Board members
Charlton H Bonham, Trout Unlimited
Harlee Branch, Office of the General Counsel, Department of Fish and Game
Karen D. Koch, Office of Regional Solicitor, U.S. Dept. of the Interior
Terry Oda, Permits Office, U.S. EPA Region 9

California Environmental Protection Agency

References (*Item numbers refer to Index for the Public Record*)

1. **Item #113:** November 2003 – draft *Revised Recovery Plan for the Paiute Cutthroat Trout*
2. **Item #33:** September 5, 2004 e-mail from William Somer, Dept. of Fish & Game, summarizing past rotenone treatments in Silver King Creek area
3. **Item #2:** Transcript of September 8 Public Hearing audiotapes
4. **Item #22:** Agenda packet—Enclosure 7: Other comment letters opposing project, August 16, 2004 letter from David Herbst, Sierra Nevada Aquatic Research Laboratory
5. **Item #170:** June 28, 2002 letter from David Herbst to State Clearinghouse; comments on Silver King Creek project Negative Declaration
6. **Item #22:** Agenda packet—Enclosure 7: Other comment letters opposing project, August 3, 2004 letter from Bob Curry, University of California
7. **Item #10:** Handouts to accompany presentation of Nancy Erman
8. **Item #174:** June 27, 2002 memorandum from Regional Board staff to Dept. of Fish & Game; comments on Silver King Creek project Negative Declaration
9. **Item #55:** August 9, 2004 comment letter, Ann McCampbell and Patricia M. Clary
10. **Item #46:** August 21, 2004 comment letter, Laurel Ames
11. **Item #57:** August 5, 2004 comment letter, Nancy Erman and Don Erman
12. **Item #72:** June 30, 2004 e-mail comment letter, Nancy Erman, literature references regarding likelihood of rare or endemic species
13. **Item #141:** April 1, 2003 memorandum from Banky Curtis, Dept. of Fish & Game, to Regional Board staff; response to comments on Negative Declaration
14. **Item #178:** June 13, 2002 comment letter from Nancy Erman to Regional Board, regarding Silver King Creek project

JC/cart:staff response rotenone petition
[Project files, Alpine County, Silver King Creek Rotenone
WDID # 6A020405008 (please route to JJC for filing)]